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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re STEVIE M., a Person Coming Under  
The Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVIE M.,

Defendant and Appellant.

F049733

(Super. Ct. No. JW09728706)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

Thomas M. Marovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Janis McLean and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Levy, J., and Cornell, J.

Appellant Stevie M., a minor, admitted allegations contained in a juvenile wardship supplemental petition (Welf. & Inst. Code, §§ 602, 777)<sup>1</sup> that he committed misdemeanor vandalism (Pen. Code, § 594, subd. (b)(2)(a)) and thereby violated the terms of probation granted in a previous wardship proceeding. On January 31, 2006, following the disposition hearing, the court ordered appellant committed to the California Youth Authority (CYA), known as of July 1, 2005, as the Division of Juvenile Justice of the California Department of Corrections.<sup>2</sup> The court declared the maximum period of physical confinement (MPPC) to be four years four months, consisting of four years for a violation of Penal Code section 245, subdivision (a)(1) (assault with a deadly weapon, viz., a knife) adjudicated in a prior wardship proceeding in 2005 and four months on the vandalism adjudication in the instant case. The court awarded appellant 145 days credit for time served.

On appeal, appellant contends the MPPC of four years four months declared by the court “exceed[ed] the statutory limitation” of section 1769 and therefore the matter should be remanded for a new disposition hearing. The People disagree with appellant’s contention that the MPPC violated section 1769, but assert nonetheless that remand is required because (1) the court failed to exercise its discretion under section 731 in setting the MPPC, and (2) the court failed to specify whether either of the offenses underlying appellant’s CYA commitment was listed in section 707(b). We will reject appellant’s argument, but nonetheless remand for further proceedings.

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<sup>1</sup> Except as otherwise indicated, all statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Two of the statutes we discuss in this opinion refer to the “Department of the Youth Authority.” (§§ 731, 1769.) For consistency and to avoid confusion, throughout this opinion we refer to CYA.

## DISCUSSION<sup>3</sup>

### Section 1769

Section 1769 provides, as relevant here, that a juvenile offender committed to CYA must be discharged no later than his or her 21st birthday unless the offender has been adjudicated of an offense listed in section 707, subdivision (b) (section 707(b)), in which case discharge must occur no later than the offender's 25th birthday.<sup>4</sup> On January 31, 2006, when appellant was committed to CYA, he was less than two months shy of his 18th birthday. Appellant argues that the MPPC of four years four months violated section 1769 because he did not commit a section 707(b) offense and the MPPC would extend past his 21st birthday. There is no merit to this contention.

Section 726 requires that when a juvenile court orders a minor removed from the custody of his or her parents or guardian and elects to aggregate the disposition from multiple counts or multiple petitions, the court must "specify" the minor's " 'maximum term of imprisonment' . . . ." (§ 726, subd. (c).) "[T]he maximum term must be specified in accordance with the formula set forth in subdivision (a) of Penal Code section 1170.1, i.e., the sum of the 'principal term' (the longest term imposed for any of the offenses) and

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<sup>3</sup> Because the facts of the instant case are not relevant to the issues raised on appeal, we will forgo recitation of those facts.

<sup>4</sup> Section 1769 provides: "(a) Every person committed to the Department of the Youth Authority by a juvenile court shall, except as provided in subdivision (b), be discharged upon the expiration of a two-year period of control or when the person reaches his or her 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800). [¶] (b) Every person committed to the Department of the Youth Authority by a juvenile court who has been found to be a person described in Section 602 by reason of the violation of any of the offenses listed in subdivision (b), paragraph (2) of subdivision (d), or subdivision (e) of Section 707, shall be discharged upon the expiration of a two-year period of control or when the person reaches his or her 25th birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800)."

‘subordinate terms’ (one-third of the middle term imposed for each other offense).” (*In re Eric J.* (1979) 25 Cal.3d 522, 536.) Although Penal Code section 1170.1, on its face, applies only to sentences for felonies, our Supreme Court has held that when a juvenile court determines the MPPC for a minor adjudicated of multiple offenses, at least one of which is a misdemeanor, and the court chooses to impose consecutive terms, subordinate misdemeanor terms are calculated as one-third of the maximum term of such offenses. (*In re Eric J.*, *supra*, 25 Cal.3d at pp. 536-538.) In addition, when a minor is ordered committed to CYA, section 731 “requires the court to particularly set *a maximum term of physical confinement* in CYA ‘based upon the facts and circumstances of the matter . . . which brought . . . the minor under the jurisdiction of the juvenile court.’ ” (*In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1538, original emphasis.) The MPPC may be equal to or less than the section 726, subdivision (c) “ ‘maximum term of imprisonment’ . . . .” (*Id.* at 1538-1540.)

Here, the court set an MPPC equal to the maximum term of imprisonment, i.e., four years four months, consisting of four years on the assault adjudication, representing the upper term for that offense, and four months on the misdemeanor vandalism adjudication, representing one-third of the 12-month maximum term for that offense.

As indicated above, appellant’s argument is premised on the claim that the MPPC would extend beyond the time section 1769 would mandate discharge from CYA, and that claim is based, in turn, on the claim that he had *not* suffered an adjudication of a section 707(b) offense and that therefore, under section 1769, he would have to be discharged from CYA no later than his 21st birthday. However, as we discuss in the next section, appellant’s 2005 assault with a deadly weapon was, in fact, a section 707(b) offense. Therefore, section 1769 would not require appellant’s discharge from CYA until his 25th birthday (§ 1769), well after the expiration of the MPPC. However, even if, as appellant argues, the MPPC declared by the court would extend beyond the time appellant could be confined in a CYA facility, his argument would fail. “On direct

appeal from a Youth Authority commitment, the appellate court has no knowledge of the actual term that a minor will serve for his offense[s]. The juvenile court does not set the actual length of Youth Authority commitments. The maximum period of physical confinements for Youth Authority is governed by the longest period of confinement possible for an adult convicted of the same offense[s] [citation]. *But, when such maximum period . . . is lengthier than the ceilings set by Welfare and Institutions Code section 1769, the latter governs.*” (*In re Thomas C.* (1986) 183 Cal.App.3d 786, 802, fn. omitted, emphasis added.) Thus, even if, as appellant contends in the present case, the MPPC extends past the section 1769 ceiling, there would be no conflict between sections 1769 and 726 and the MPPC would not violate section 1769.

**Section 707(b)**

California Rules of Court, rule 1494.5(b) (rule 1494.5(b)) provides that when a juvenile court commits a minor to CYA, “[t]he court must specify whether the offense is one listed in section 707(b) . . . .” As indicated above, a minor adjudicated of a section 707(b) offense is subject to a longer period of CYA commitment than a minor adjudicated of an offense not listed in section 707(b). (§ 1769.)

Here, at the disposition hearing, the court, after stating that appellant was committed to CYA based on his adjudications of assault with a deadly weapon and misdemeanor vandalism, stated, “Neither of those offenses are offenses listed under Section 707(b) *or at least not to my knowledge at this point.*” (Emphasis added.)

The People argue, apparently based on the portion of this statement italicized above, that the court did not make the finding required by rule 1494.5(b), and therefore the matter should be remanded to allow the court to make the required finding. We disagree. In our view, the court’s statement is sufficiently unequivocal to constitute a finding that neither of the two offenses on which appellant’s CYA commitment was based is a section 707(b) offense.

We further conclude that, as the People also indicate, this finding is erroneous. We acknowledge that assault with a deadly weapon is not listed, as such, in section 707(b). But, “[a]ssault by any means of force likely to produce great bodily injury” is a section 707(b) offense. (§ 707, subd. (b)(14).) And as we explain below, assault with a deadly weapon is included within that offense.

In *In re Pedro C.* (1989) 215 Cal.App.3d 174, the minor admitted committing a violation of former Penal Code section 245, subdivision (b) (now Penal Code section 245, subdivision (c)) which proscribes the commission of “an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or fireman engaged in the performance of his or her duties . . . .” Specifically, the offense admitted was “ ‘an assault with a deadly weapon or instrument, to wit: motor vehicle upon . . . . a peace officer . . . .’ ” (*In re Pedro C.*, *supra*, 215 Cal.App.3d at p. 182.)

The court held that “section [707, subdivision (b)(14)] embraces violations of Penal Code section 245, subdivision (b) which are charged as assaults with a deadly weapons or instruments, rather than as assaults by means of force likely to produce great bodily injury.” (*In re Pedro C.*, *supra*, 215 Cal.App.3d at p. 182.) The court, noting that section 707(b) lists “serious felonies,” reasoned as follows: “Given this statutory scheme, for this court to determine that assault with a deadly weapon is not a section 707, subdivision (b) offense would be to elevate form over substance. [Citation.] ‘ “A deadly weapon is one likely to produce death or great bodily injury.” ’ [Citations.] Necessarily, then, *assault with a deadly weapon includes assault by means likely to produce great bodily injury*. . . . [T]herefore, . . . appellant’s Penal Code section 245, subdivision (b) offense falls within the purview of section 707, subdivision (b) . . . .” (*In re Pedro C.*, *supra*, 215 Cal.App.3d at pp. 182-183, *emphasis added*.) Similarly, appellant’s assault with a deadly weapon also falls within the purview of section 707(b). Therefore, the court erred in finding that appellant did not commit any section 707(b) offenses.

### Section 731

The People argue, and appellant does not dispute, that the record does not reveal whether the court, in setting the MPPC, considered the facts and circumstances that brought appellant before the juvenile court, and therefore this matter must be remanded to allow the court to consider these matters. We agree.

Section 731, subdivision (b) (section 731(b)) has long provided that a minor may not be committed to CYA “for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.” Effective January 1, 2004, the Legislature added to section 731(b): “A minor committed to [CYA] also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section.”

In *In re Carlos E.*, *supra*, 127 Cal.App.4th 1529, this court held that the 2004 amendment to section 731(b) gives the juvenile court the discretion in any case in which it commits a minor to CYA to fix the MPPC at less than the adult statutory maximum, based on the facts and circumstances of the individual case. The First and Third District Courts of Appeal came to the same conclusion in *In re Sean W.* (2005) 127 Cal.App.4th 1177 and *In re Jacob J.* (2005) 130 Cal.App.4th 429, respectively. In each of these cases, the record was apparently silent on the issue of whether the court understood its discretion to select terms less than the maximum. (*Id.* at p. 438; *In re Carlos E.*, *supra*, 130 Cal.App.4th at p. 1533; *In re Sean W.*, *supra*, 127 Cal.App.4th at p. 1182.) And in each of these cases, the court ordered the matter remanded.

Here, as indicated above, the MPPC declared by the court was equal to the adult maximum. And as the People assert, “the record does not indicate whether the court

considered appellant's individual circumstances prior to imposing the maximum term." Accordingly, as the People contend, remand is appropriate.

### **DISPOSITION**

The court's finding that appellant's adjudication of assault with a deadly weapon did not constitute an adjudication of a section 707(b) offense is reversed. The matter is remanded to the juvenile court. On remand, the juvenile court is directed to (1) specify that appellant was adjudicated of a section 707(b) offense, viz., assault with a deadly weapon, and (2) set a maximum term of confinement in CYA based on the facts and circumstances that brought appellant before the juvenile court. In all other respects, the judgment is affirmed.